



STATE OF ARKANSAS CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of construction law in Arkansas. The discussion on any particular topic is not necessarily an indication of the total law related to an area of Arkansas's construction law. Most construction disputes are governed by contract law.

I. BREACH OF CONTRACT

The construction of any structure, residential or commercial, generally involves a detailed written contract. Arkansas has a five year statute of limitation for any cause of action based on a written contract, duty or right. Ark. Code Ann. § 16-56-111. In addition, section 16-56-112 concerns the limitation period for bringing an action arising from the deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency. The statute provides that the limitation period shall commence upon substantial completion of an improvement. Accordingly, actions based on a contract to recover damages must be brought within five years after the date of substantial completion. Ark. Code Ann. § 16-5-112(a). However, the statute specifically states that "[n]othing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any cause of action, nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise." Ark. Code Ann. § 16-56-112(f). The courts have construed this statute as a statute of repose. *Curry v. Thornsberry*, 354 Ark. 631, 638, 128 S.W.3d 438, 441 (Ark. 2003). Therefore, under section 16-56-112(a) there is a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property, which period commences after substantial completion of the improvement, but, in bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. *East Poinsett Cnty. School Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 34, 800 S.W.2d 415, 417 (Ark. 1990). See Section VII, Statutes of Repose/Statutes of Limitation, *infra*.

"The remedies for breach of a construction contract depend upon whom is the breaching party and when the breach occurs in relation to the construction." Howard Brill, *Arkansas Law Of Damages* § 17:3 (6th ed. 2014). If the contractor is in breach, the owner may be entitled to rescission and restitution for any payments made on the contract. *Id.*; see also *Economy Swimming Pool Co. v. Freeling*, 236 Ark. 888, 370 S.W.2d 438 (Ark. 1963); *Central Ark. Foundation Homes, LLC v. Choate*, 2011 Ark. App. 260, 383 S.W.3d 418. When a purchaser is in breach, and has prevented a builder from completing the project, the builder has two options: sue on the contract or seek recovery on a theory of quantum meruit. Howard Brill, *Arkansas Law of Damages* § 17:3 (6th ed. 2014). If he or she chooses to sue on the contract, the recovery is the contract price less the amount saved by not completing the project. *Id.* A contract for residential construction which includes an express warranty detailing standards of workmanship will exclude any implied warranty on that subject. *Id.*; *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (Ark. 1978).

II. NEGLIGENCE

An action for negligence in construction may arise due to a deficiency in design, planning, or supervision of a construction project. A cause of action may allege negligent supervision, negligent hiring, or negligent construction. *Daniel v. Quick*, 270 Ark. 528, 606 S.W.2d 81 (Ark. Ct. App. 1980). There is a four year statute of limitations on filing any such action involving personal injury or wrongful death. Ark. Code Ann. § 16-56-112(b)(1).

However, the statute of limitation as set forth in Ark. Code Ann. § 16-56-112(b)(1) is only applicable if it is the shorter of the remaining statutes of limitation when compared with Ark. Code Ann. § 16-56-105. Under Ark. Code Ann. § 16-56-105, the statute of limitation for personal injury and negligence, which includes negligent supervision, negligent hiring, and negligent construction, is three years. Thus, in bringing such a suit for personal injury or negligence due to a deficiency in design, planning, or supervision of a construction project, the injured party must still bring the action within the statute of limitations for that type of cause of action. *East Poinsett Cnty. School Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 34, 800 S.W.2d 415, 417 (Ark. 1990). For example, if the breach or injury occurs immediately after substantial completion of the improvement or repair, the injured party must still comply with Ark. Code Ann. § 16-56-105(3) and bring his action within three years from when the breach occurs but not later than the five year period provided in Ark. Code Ann. § 16-56-112(a). *Id.*

In another example, Ark. Code Ann. § 16-56-112(b) can apply to extend the statute of limitations for personal injury or negligence due to a deficiency in design, planning, or supervision of a construction project. If a person was to get injured due to personal injury or negligence due to a deficiency in design, planning, or supervision of a construction project on the last day before the four year statute of limitation from substantial completion was to run, Ark. Code Ann. § 16-56-112(b) would apply, giving an additional one year for the lawsuit to be filed. Ark. Code Ann. § 16-56-112 strictly limits the extension of statutes of limitation, as stated above, thus even if the cause of action is one that would normally have a statute of limitations of three years pursuant to Ark. Code Ann. § 16-56-105(3), that statute of limitations would not apply, and the injured party would only have one year in which to bring the suit.

With regard to general tort liability, Arkansas courts have held that the foreseeability and negligence rules applicable in products liability cases should be controlling in an owner-contractor situation, with considerations such as owner inspection and acceptance, the time between construction and injury, and other intervening factors considered in evaluating the question of negligence. *Suneson v. Holloway Const. Co.*, 337 Ark. 571, 992 S.W.2d 79 (Ark. 1999). Professional malpractice liability for design and construction professionals is not addressed directly in the Arkansas Code, but rather arises under general negligence and intentional tort theories.

Negligence is virtually never the sole cause of action in a construction defect case but is coupled with breach of contract or breach of warranty claims. *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (Ark. 1999) (asserting claims of negligence, breach of implied warranties, constructive

fraud, and misrepresentation); *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (Ark. 1997) (asserting claims of misrepresentation, negligence, strict liability, and breach of implied warranty of habitability); *Bankston v. Pulaski Cnty. School Dist.*, 281 Ark. 476, 665 S.W.2d 859 (Ark. 1984) (asserting claims for negligent performance of contract, breach of express and implied warranties, negligence, and strict liability); *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (Ark. 1983) (asserting claims for rescission, breach of express and implied warranties, and negligence); *Curry v. Thornsberry*, 81 Ark. App. 112, 98 S.W.3d 477 (Ark. Ct. App. 2003) (asserting claims for negligence and breach of implied warranties of fitness, habitation, and merchantability).

III. BREACH OF WARRANTY

In construction cases, plaintiffs typically assert causes of action for breach of warranty. The breach of warranty can be based on an express warranty contained in the contract between the plaintiff and the general contractor or warranties implied by law.

Arkansas first recognized an implied warranty in contract between a builder-vendor of a new house and the first purchaser in 1970. *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (Ark. 1970). The Arkansas Supreme Court later extended the implied warranty in favor of subsequent purchasers for a reasonable length of time where there is no substantial change in the condition of the building from the original sale. *Blagg v. Fred Hunt Co., Inc.*, 272 Ark. 185, 612 S.W.2d 321 (Ark. 1981). However, the law limits this implied warranty "to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase." *Blagg*, 272 Ark. at 187, 612 S.W.2d at 322. Further, Arkansas courts have held that the implied warranty of fitness applies when a contractor uses plans furnished by the purchaser to construct a dwelling and when the contractor uses his or her own plans to construct a dwelling offered for sale to the general public. *Daniel v. Quick*, 270 Ark. 528, 606 S.W.2d 81 (Ark. Ct. App. 1980).

The Arkansas Supreme Court has adopted the view that, by operation of law, a builder-vendor gives implied warranties of habitability, sound workmanship, and proper construction. *Bullington v. Palangio*, 345 Ark. 320, 45 S.W.3d 834 (Ark. 2001). The implied warranty does not rest upon an agreement but arises by operation of law and is intended to hold the builder-vendor to a standard of fairness. *Id.* at 328, 45 S.W.3d at 839 (citing *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (Ark. 1997)). However, implied warranties may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is excluded. *Id.* (citing *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (Ark. 1978)).

In *Carter*, the Arkansas Supreme Court stated that "[a]lthough we have no cases involving the effect of an express warranty upon an implied warranty in building contracts, we conclude that implied warranties are not applicable when there is an express warranty . . . [on the subject of an asserted implied warranty]." *Carter*, 263 Ark. at 205-206, 563 S.W.2d at 463. However, the Arkansas Supreme Court later revisited *Carter v. Quick* in its opinion in *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (Ark. 1983). In *Wingfield* the court, noting the above-stated rule of

Carter, stated that "[a]ssuming the implied warranty of habitability could be properly disclaimed, issues of the disclaimer's conspicuousness, detail, and reasonableness would merit our consideration. This area of our common law troubles us and we will welcome the opportunity to reexamine it. However, the issue is not now before us." *Wingfield*, 278 Ark. at 281-282, 644 S.W.2d at 944. Given the language in *Wingfield v. Page*, there may be risk involved in relying on the rule of *Carter v. Quick*.

Arkansas law also recognizes a warranty that plans and specifications supplied by the owner of the property to the contractor are suitable and adequate for the purpose for which they were tendered. *Housing Authority of City of Texarkana v. E.W. Johnson Const. Co., Inc.*, 264 Ark. 523, 573 S.W.2d 316 (Ark. 1978). Arkansas law states that this warranty is implied and "is not nullified by any stipulation requiring the contractor to make an on-site inspection where the repairs are to be made and a requirement that the contractor examine and check the plans and specifications." *Housing Authority of City of Texarkana*, 264 Ark. at 533, 573 S.W.2d at 322. However, this implied warranty does not relieve the contractor of all responsibility under the contract. "[A] competent and experienced contractor cannot rely upon submitted specifications and plans where he [or she] is fully aware, or should have been aware, that the plans and specifications cannot produce the proposed results." *Id.* Finally, a breach of this implied warranty by the owner cannot be cured by "simply extending the time of the performance of a contractor's assignment." *Id.*

IV. MISREPRESENTATION AND FRAUD

If damage occurs as a result of deficiency in construction and the deficiency was fraudulently concealed, the statutory limitations periods are not applicable. Ark. Code Ann. § 16-56-112(d). Fraudulent concealment tolls the statute of limitations until the party having the cause of action discovers the fraud or should have discovered it by the exercise of due diligence. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (Ark. 2003); *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (Ark. 2000).

There are five elements to the tort of fraud, misrepresentation, or deceit: 1) a false representation of material fact; 2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; 3) intent to induce action or inaction in reliance on the representation; 4) justified reliance on the representation; and 5) damage suffered as a result of the reliance. *Rosser v. Columbia Mutual Ins. Co.*, 55 Ark. App. 77, 928 S.W.2d 813, 815 (Ark. App. 1996) (citing *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (Ark. 1993)). To survive a motion to dismiss, the plaintiff must plead a "furtive, secret, positive act of fraud." *Carlson v. Kelso Drafting and Design, Inc.*, 2010 Ark. App. 205, 374 S.W.3d 726 (Ark. App. 2010). Punitive damages are available for a successful cause of action based on misrepresentation or fraud. Brill, *Arkansas Law of Damages* § 9:2 (6th ed. 2014); *Morris v. Knopick*, 2017 Ark. App. 225, at 13, 521 S.W. 3d 495, 504, reh'q denied (May 17, 2017) ("Fraud is an intentional tort, and courts *may* award punitive damages for an intentional tort.") (emphasis in original) (citing *Mitchell v. Beard*, 256 Ark. 926, 513 S.W. 2d 905 (1974)).

V. STRICT LIABILITY CLAIMS

Arkansas law allows for recovery of purely economic losses under the Arkansas strict liability statute. Ark. Code Ann. § 16-116-101; *Bayer Crop Science LP v. Schafer*, 2011 Ark. 518, at 15, 385 S.W.3d 822, 832 (recognizing that Arkansas law does not recognize the economic-loss doctrine in strict liability cases). In construction cases, a cause of action for strict liability may be pled but is seldom the basis for an award of damages. *Wingfield v. Page*, 278 Ark. 276, 279, 644 S.W.2d 940, 942 (Ark. 1983) (“[A] purchaser may seek relief under the statutory remedy of strict liability which imposes liability, as a matter of public policy, on the party best able to shoulder it.”). In *Blagg v. Fred Hunt Co., Inc.*, the Arkansas Supreme Court held there is “no valid reason for holding that strict liability should not apply to property damage in a house sold by a builder-vendor. Accordingly, in construing the Arkansas strict liability statute, . . . the word ‘product’ is . . . applicable to a house” 272 Ark. 185, 190, 612 S.W.2d 321, 324 (Ark. 1981).

Arkansas Code Annotated section 16-116-101 states that a supplier of a product is subject to liability in damages for harm to a person or property if the product supplied in a defective condition rendered it unreasonably dangerous; however, the Arkansas legislature narrowed application of the strict liability statute with regard to improvements on real property by including section 16-116-101 (c)(2) of the Arkansas Code to state:

(A) Except as provided in subdivisions (c)(2)(B) and (C) of this section, real estate and improvements located on real estate shall not be considered a product under this section.

(B) Any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement on real estate shall be considered a product under this section.

(C) If environmental contaminants exist or have occurred in an improvement on real estate, the improvement on real estate shall be considered a product under this section.

Ark. Code Ann. § 16-116-101.

VI. INDEMNITY CLAIMS

A. Express Indemnity

Express indemnity arises by virtue of a contract and holds one liable for the acts or omissions of another over whom he has no control. *East-Harding, Inc. v. Horace A. Piazza & Assocs.*, 80 Ark. App. 143, 148, 91 S.W.3d 547, 550 (Ark. App. 2002); *Chevron U.S.A., Inc. v. Murphy Exploration & Production Co.*, 356 Ark. 324, 330, 151 S.W.3d 306, 310 (Ark. 2004). Contracts of indemnity are construed in accordance with Arkansas’s rules for the construction of contracts generally. *Id.* at 148, 91 S.W.3d at 551. “Given the nature of indemnification,

[Arkansas] courts have held that the language imposing indemnity must be clear, unequivocal, and certain While no particular words are required, the liability of an indemnitor for the negligence of an indemnitee is an extraordinary obligation to assume, and [the court] will not impose it unless the purpose to do so is spelled out in unmistakable terms.” *Id.* at 148-49, 91 S.W.3d at 551 (citations omitted). The agreement of indemnification must contain a clear expression of the intent of the parties to indemnify against certain losses or liabilities. *Anthony v. Louisiana & Arkansas Ry. Co.*, 316 F.2d 858, 863-64 (8th Cir. 1963). In determining the intention of the parties to an indemnification agreement, such intent must be gathered from an instrument as a whole. *Id.* at 864.

B. Implied Indemnity

An implied indemnity agreement will only arise when there is a special relationship carrying with it a duty to indemnify. *Cherry v. Tanda, Inc.*, 327 Ark. 600, 940 S.W.2d 457 (Ark. 1997). In *Oaklawn Jockey Club, Inc. v. Pickens-Bond Const. Co.*, an employee of Pickens-Bond was injured when construction equipment came in contact with power lines in the vicinity of the work area. 251 Ark. 1100, 477 S.W.2d 477 (Ark. 1972). The Arkansas Supreme Court found an implied indemnity contract existed between Oaklawn and Pickens-Bond because the injury was “caused by and occurred under the control of Pickens-Bond and . . . Oaklawn was only secondarily liable.” *Id.* at 1102, 477 S.W.2d at 478. The court held implied indemnity was appropriate in spite of the fact that the employee was covered by Worker’s Compensation. *Id.* A court will not create the implied indemnity from thin air but may infer such indemnity from language of a written contract between the parties or from a duty created by a statute. *Smith v. Paragould Light & Water Com’n*, 303 Ark. 109, 793 S.W.2d 341 (Ark. 1990); *see also Intents, Inc. v. Southwestern Electric Power Co.*, 2011 Ark. 32, 376 S.W.3d 435; *Oaklawn*, 251 Ark. 1100, 477 S.W.2d 477.

C. Indemnity Statutes

Arkansas Code Annotated section 4-56-104, as amended by Act 1120 of the 2015 Arkansas General Assembly reads,

A provision in a construction agreement or construction contract is void and unenforceable as against public policy if it requires an entity or that entity’s insurer to indemnify, defend, or hold harmless another party against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of the negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers.

However, section 4-56-104(e) states that provisions of section 4-56-104 do not affect any provision in a public construction contract or public construction agreement:

(1) That requires an entity of that entity’s insurer to indemnify another entity against liability for damages arising out of the death of or bodily injury to persons or damage to property, but the indemnification shall not exceed any amounts that are greater than that

represented by the degree or percentage of negligence of fault attributable to the indemnitors, its agents, representatives, subcontractors, or suppliers; or (2) [t]o provide construction work or services to an operator or other person directly related to activities or operations stemming from the exploration, drilling, production, processing, gathering, or movement of oil or gas, including without limitation the planning, construction, site preparation, or installation of equipment, facilities, or structures, on or off at least one (1) site where any exploration or production operations have occurred, are occurring, or will occur.

D. Third Party Beneficiary

A party can be a third-party beneficiary to an indemnity agreement. *Stilley v. James*, 345 Ark. 362, 373, 48 S.W.3d 521, 529 (2001) (finding that appellees were third party beneficiaries to an indemnity agreement). However, a contract, including an indemnification agreement, will not be construed as having been made for the benefit of third parties unless it clearly appears that such was the intention of the parties. *Cherry v. Tanda, Inc.*, 327 Ark. 600, 609, 940 S.W.2d 457, 460 (1997).

VII. STATUTE OF REPOSE/STATUTE OF LIMITATIONS

Arkansas Code Annotated section 16-56-112 concerns the limitations period for bringing an action arising from the “deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by [a] deficiency,” as well as an action for damages caused by any “deficiency in surveying, establishing, or making the boundaries of real property, the preparation of maps, or the performance of any other engineering or architectural work upon real property or improvements to real property.” Ark. Code Ann. § 16-56-112(a), (b)(1), (c). Section 16-56-112 defines the limitations of action in contract at five years, in tort at four years, and disallows any claim based on designs or plans not utilized within three years. *See* Ark Code Ann. § 16-56-112(a), (b)(1), (e). The statute provides that the limitation period shall commence upon substantial completion of an improvement. *See* Ark. Code Ann. § 16-56-112(a), (b). The Arkansas Supreme Court interprets § 16-56-112 as a statute of repose. *See, e.g., Curry v. Thornsberry*, 354 Ark. 631, 638, 128 S.W.2d 438, 441 (Ark. 2003). Therefore, if the event giving rise to a claim occurs between three and five years after substantial completion of a construction project, practitioners would be well-advised to carefully plead the applicable statute of limitations.

The provision in section 16-56-112 covering tort claims includes an exception for claims occurring in the “third year after the substantial completion[.]” Ark. Code Ann. § 16-56-112(b)(2). Notably, the Arkansas Supreme Court has held that section 16-56-112(a), which governs contractual disputes, is broad enough to include actions arising out of construction contracts where damages are caused by torts. *See Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (Ark. 1983). The significance of this finding is that in paragraph (b)(2) of section 16-56-112, which covers the timing of an occurrence in tort, the legislature

actually meant the “fourth” year rather than the “third” year after substantial completion. See *Dooley v. Hot Springs Family YMCA*, 301 Ark. 23, 26, 781 S.W.2d 457, 458 (Ark. 1989) (“We feel the legislature simply made a mistake and used ‘third’ instead of ‘fourth’ and correct it without hesitation.”). However, because section 16-56-112 contains an express provision stating that “[n]othing in the section shall be construed as extending the period prescribed by [law] for the bringing of any cause of action,” an action in contract may be limited to three years. Ark. Code Ann. § 16-56-112(f); see also *E. Poinsett Cnty. Sch. Dist. v. Union Std. Ins. Co.*, 304 Ark. 32, 34, 800 S.W.2d 415, 417 (Ark. 1990) (noting Ark. Code Ann. § 16-56-105 imposes a three-year statute of limitations on breach-of-contract claims and interpreting § 16-56-112(f) as limiting claims on the indemnity provision of a construction contract under § 16-56-112(a) to three years rather than five).

The Arkansas Supreme Court has also held that because a statute of repose is not an affirmative defense, failure to plead it as an affirmative defense is not a bar to raising the issue on appeal. See *Ray & Sons Masonry Contrs., Inc. v. U. S. Fid. & Guar. Co.*, 353 Ark. 201, 218, 114 S.W.3d 189, 199 (Ark. 2003).

VIII. ECONOMIC LOSS DOCTRINE

Arkansas strict liability statutes permit recovery of purely economic losses. “A supplier of a product is subject to liability in damages for harm to a person or to property if . . . [t]he product [is] supplied . . . in a defective condition that rendered it unreasonably dangerous.” Ark. Code Ann. § 16-116-101(a)(2). In construction cases, a cause of action for strict products liability claiming purely economic losses will not be barred by the economic loss doctrine. See *Blagg v. Fred Hunt Co., Inc.*, 272 Ark. 185, 189-90, 612 S.W.2d 321, 323-24 (Ark. 1981). The “responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved.” *Id.* at 189, 612 S.W.2d at 323 (quotation omitted). For a cause of action for strict products liability to be successful, it is necessary that the alleging party prove that the product, e.g., the house, was sold “in a defective condition unreasonably dangerous.” *O’Mara v. Dykema*, 328 Ark. 310, 319, 942 S.W.2d 854, 858 (Ark. 1997) (citing Ark. Code Ann. § 16-116-102); see also *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (Ark. 1983) (holding a defect in an irrigation pump was ineffective but not unreasonably dangerous and thereby barred recovery for purely economic losses). A claim of this sort is rarely the basis of recovery. See, e.g., *Wingfield v. Page*, 278 Ark. 276, 279, 644 S.W.2d 940, 942-43 (Ark. 1983) (“In the case at bar the appellees did not seek to recover under the doctrine of strict liability.”).

IX. DAMAGES, GENERALLY

The remedies for breach of a construction contract depend upon who is the breaching party and when the breach occurs in relation to the construction. See Howard W. Brill, *Arkansas Law of Damages* § 17:3 (6th ed. 2014).

If the contractor commits a material breach, the owner may be entitled to rescission of the contract and restitution of payments. See *Economy Swimming Pool Co. v. Freeling*, 236 Ark.

888, 891, 370 S.W.2d 438, 440 (Ark. 1963). Alternatively, if the owner wishes to have construction completed, he is entitled to the cost of hiring a third party to complete the work that the breaching party had contracted to do. *See Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 17, 964 S.W.2d 213, 217 (Ark. 1998). Damages are measured by the difference between the unpaid portion of the contract price, which the owner has saved, and the reasonable cost of completing construction. *See Mason v. Russenberger*, 260 Ark. 561, 562, 542 S.W.2d 745, 746 (Ark. 1976).

If the contract is performed but the building is constructed defectively, the owner is entitled to the difference in the value of the structure as actually constructed and its value if it had been constructed as required by the contract. *See Carter v. Quick*, 263 Ark. 202, 208, 563 S.W.2d 461, 464 (Ark. 1978). However, if the defective work can be corrected or replaced without resulting in unreasonable economic waste and without material injury to the building as a whole, the cost of correction is the proper measure of recovery. *See id.* at 208-09, 563 S.W.2d at 464-65. As between the cost measure and the value measure, the cost rule is preferred, if economically feasible, because the owner receives the monetary equivalent of what he bargained for: construction properly done. *See id.* at 209-10, 563 S.W.2d at 465.

X. RECOVERY FOR INVESTIGATIVE COSTS

There is no published Arkansas decision on the recovery of investigative costs as an element of recoverable damage in a defective construction claim.

XI. EMOTIONAL DISTRESS CLAIMS

There are currently no Arkansas cases directly on point as to whether homeowners can recover emotional distress damages because of construction defects to their homes. However, as a general rule, Arkansas does not allow recovery for emotional distress caused by damage to property, nor does it recognize the tort of negligent infliction of emotional distress. Brill, Arkansas Law of Damages §§ 4:6 & 33:12 (6th ed. 2014); *Dowty v. Riggs*, 2010 Ark. 465, 385 S.W.3d 117.

XII. STIGMA DAMAGES

There is no reported opinion from the State of Arkansas addressing the issue of stigma damages.

XIII. ECONOMIC WASTE

It is Arkansas policy that calculation of damages should make economic sense and should not be practically foolish. Brill, Arkansas Law of Damages § 4:9 (6th ed. 2014). Arkansas courts will measure damages in construction cases by the cost of curing defects rather than the breach of contract remedy of “difference in value,” except where the actual cost of curing the defects would cause unreasonable economic waste. *Carter v. Quick*, 263 Ark. 202, 209, 563 S.W.2d 461, 465 (Ark. 1978); Brill, Arkansas Law of Damages § 4:9 (6th ed. 2014). “[T]he courts’ preference

for the cost of repairs measure and the economic waste exception are devices to avoid the situation where the contractor is required to tear down a structure, or otherwise commit economic waste, to correct a defect that does not detract from the market value as much as it would cost to repair it.” *Williams v. Charles Sloan, Inc.*, 17 Ark. App. 247, 251, 706 S.W.2d 405, 407 (Ark. App. 1986). However, the judicial “preference for the cost-of-repair measure and the economic waste exception does not limit the injured buyer to only one measure of damages.” *Pennington v. Rhodes*, 55 Ark. App. 42, 53, 929 S.W.2d 169, 175 (Ark. App. 1996).

XIV. DELAY DAMAGES

Under Arkansas law, when a contractor delays completion of a building, the proper measure of damages is the rental value of the building during the time that the owner is deprived of its use. *Cinnamon Valley Resort v. EMAC Enterprises, Inc.*, 89 Ark. App. 236, 246, 202 S.W.3d 1, 7 (Ark. App. 2005) (citing *Long v. Chas. T. Abeles & Co.*, 77 Ark. 150, 91 S.W. 29 (Ark. 1905)). However, the breaching party will not be liable for consequential damages growing out of the delay unless such special damages were reasonably in the contemplation of both parties at the time they made the contract. See *Long*, 77 Ark. 150, 91 S.W.29 (1905); *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 258, 987 S.W.2d 722, 728 (Ark. 1999). If lost profits are a natural and direct result of the breach, the damages are considered general in nature and the tacit agreement rule does not apply. See *Acker Constr., LLC v. Tran*, 2012 Ark. App. 214, at 10, 396 S.W.3d 279, 288.

The owner is occasionally entitled to prejudgment interest as well. “Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. Where prejudgment interest may be collected at all, the injured party is always entitled to it as a matter of law.” *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 223–24, 114 S.W.3d 189, 203 (2003) (citations omitted) (quoting *Ozarks Unlimited Resources Cooperative, Inc. v. Daniels*, 333 Ark. 214, 224, 969 S.W.2d 169, 174 (Ark. 1998)).

XV. PUNITIVE DAMAGES

The purpose of punitive damages is to deter and punish the wrongdoer. See Brill, *Arkansas Law of Damages* § 9:1 (6th ed. 2014); *Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 327, 867 S.W.2d 446, 450 (Ark. 1993), *modified on other grounds by Woodline Motor Freight, Inc. v. Troutman Oil Co., Inc.*, 327 Ark. 448, 938 S.W.2d 565 (1997). One cannot recover punitive damages if the sole cause of action is based in contract. *Wheeler*, 315 Ark. at 327, 867 S.W.2d at 450. However, one should not be prevented from receiving punitive damages in a contract action where the basis of revocation or rescission is misrepresentation, fraud, or deceit. *Id.* Punitive damages are available in a deceit action even if restitution rather than compensatory damages is awarded. *Id.*

While ordinary punitive damages are not recoverable in breach of contract cases, the rule is not absolute, and there are exceptions. Recovery of punitive damages will lie in a cause of action based solely in contract where the breaching party's conduct is willful or malicious. See *McClellan v. Brown*, 276 Ark. 28, 30, 632 S.W.2d 406, 407 (Ark. 1982). However, a bare allegation of fraud that results in monetary loss will not justify punitive damages. See *id.* Also, where breach of contract includes elements that enable the court to regard the case as falling within the field of tort, punitive damages may be awarded. However, in instances in which the facts may support either a contract action or a tort action, a court presumes that the action is in contract, and punitive damages are not recoverable. See *L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 10, 665 S.W.2d 278, 281 (Ark. 1984). To overcome the presumption, the plaintiff must specifically plead and prove a tortious cause of action. See *id.*

XVI. ATTORNEY'S FEES

The court may assess reasonable attorney's fees and grant an award to the prevailing party in a civil action for breach of contract. Ark. Code Ann. § 16-22-308. An action alleging breach of the implied warranty of fitness and habitability is an action on the contract allowing for an award of attorney's fees under section 16-22-308. *Curry v. Thornsberry*, 354 Ark. 631, 644, 128 S.W.3d 438, 445 (Ark. 2003). Additionally, the prevailing party in any suit in which a contractor, subcontractor, laborer, or material supplier seeks to enforce a materialmen's lien shall be allowed an award of reasonable attorney's fees. Ark. Code Ann. § 18-44-128.

XVII. EXPERT FEES AND COSTS

Expert witness fees are not recoverable costs against the losing party because the allowance of costs is purely statutory, and Arkansas has no statute which provides for the recovery of expert fees. *Wood v. Tyler*, 317 Ark. 319, 321, 877 S.W.2d 582, 583 (Ark. 1994).

XVIII. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

The language in an insurance policy is to be construed in its plain, ordinary, and popular sense. *Gawrieh v. Scottsdale Ins. Co.*, 83 Ark. App. 59, 117 S.W.3d 634, 640 (Ark. App. 2003). Under Arkansas law, the intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language. *Id.* To be ambiguous, a term in an insurance policy must be susceptible to more than one reasonable construction. *Id.* at 71, 117 S.W.3d at 641 (J. Gladwin, dissenting). If the terms of an insurance contract are not ambiguous, it is unnecessary to resort to the rules of construction; in such cases, the policy will not be interpreted to bind the insurer to a risk which it plainly excluded and for which it was not paid. *Id.*

However, if the policy language is ambiguous, and thus susceptible to more than one reasonable interpretation, the policy will be construed liberally in favor of the insured and strictly against the insurer. *Id.* at 69, 117 S.W.3d at 640. Whether the language of a policy is ambiguous is a question of law to be resolved by the court. *Id.* Language is ambiguous if there is doubt or

uncertainty as to its meaning and it is susceptible to more than one reasonable interpretation. *Id.* at 69-70, 117 S.W.3d at 640.

XIX. CONSTRUCTION LIENS

Arkansas's materialmen's lien laws are codified in Chapter 44 of Title 18 of the Arkansas Code. Ark. Code Ann. §§ 18-44-101 *et seq.* Under Arkansas's construction lien laws, contractors, subcontractors, material suppliers, architects, engineers, surveyors, appraisers, landscapers, and title insurance agents are entitled to materialmen's liens. *See* Ark. Code Ann. §§ 18-44-101 and 18-44-105. A construction lien cannot exist in Arkansas without a valid contract with the property owner. *See* Ark. Code Ann. § 18-44-101. The necessary contract can be by an express agreement or implied from the circumstances or conduct of the parties. *See Gillison Discount Bldg. Materials, Inc. v. Talbot*, 253 Ark. 696, 698, 488 S.W.2d 317, 319 (Ark. 1972).

In Arkansas, there are distinct notice requirements that must be satisfied before a lien claimant can assert a lien. *See* Ark. Code Ann. § 18-44-115. These notice requirements vary depending on whether the project is commercial or residential. *See id.* A residential project is a project containing four or fewer residential units. *See* Ark. Code Ann. § 18-44-115(b)(1)(B). Commercial real estate is defined as "nonresidential real estate" and "residential real estate containing five or more units." *See* Ark. Code Ann. § 18-44-115(b)(2)(A).

On residential projects, a contractor is charged with giving a preconstruction notice, which must be given prior to the start of any work on the project. *See* Ark. Code Ann. § 18-44-115. If the contractor fails to provide such notice, he is barred from bringing an action to enforce any provision of the residential contract in law or equity. *See* Ark. Code Ann. § 18-44-115(a)(4). Subcontractors and suppliers also have the right to give the notice before the start of their work to protect their lien rights. *See* Ark. Code Ann. § 18-44-115(a)(5). The preconstruction notice may be incorporated into the contract or affixed to the contract and shall be conspicuous, set out in boldface type, and worded exactly as stated in Arkansas Code Annotated section 18-44-115(a)(7). Arkansas recognizes an exception, however, if the residential owner "orders materials or services *directly* from the claimant." Ark. Code Ann. § 18-44-115(a)(8)(A)-(B) (emphasis added). This is known as the "direct sale" exception. In *Hammerhead Contracting & Development, LLC v. Ladd*, the Arkansas Supreme Court determined that the "direct sale" exception to the preconstruction notice statute applies to general contractors where: (1) the owner orders materials or services directly from the contractor; (2) the owner is in direct privity with the contractor; and (3) there are no undisclosed suppliers or laborers. 2016 Ark. 162, at 7, 489 S.W.3d 654, 659. The Court arrived at this conclusion by construing the words "[a] sale shall be a direct sale only if the owner orders materials or services from the lien claimant" set forth in Ark. Code Ann. § 18-44-115(a)(8)(B) in their ordinary and usually accepted meaning. This case has important potential effects upon construction law in Arkansas. Ark. Code Ann. § 18-44-107(1) defines "contractor" as "any person who contracts orally or in writing *directly* with a person holding an interest in real estate, or such person's agent for the construction of any improvement to or repair of real estate." (emphasis added). As the dissenting opinion in *Hammerhead* notes, this statutory definition of "contractor" seems to indicate "a property

owner's dealings with a general contractor . . . are always going to fall within the direct-sale exception." *Hammerhead*, 2016 Ark. 162, at 9, 489 S.W.3d at 660. Effectively, the majority's opinion in *Hammerhead* "writes the statute out of the Arkansas Code" as "there is no situation in which a general contractor will not be sheltered by the direct-sale exception." *Id.*

Nearly one year after the *Hammerhead* decision, the Arkansas legislature passed Act 808 of 2017 on April 1, 2017, which went into effect on August 1, 2017. Act 808 amended the Arkansas direct-sale exception under Ark. Code Ann. § 18-44-115(a)(8) to include the following language: "(B) A sale shall be a direct sale only if: (i) The property owner orders materials or services from the lien claimant; and (ii) *The lien claimant is not a home improvement contractor as defined by § 17-25-502(2) or a residential building contractor as defined by § 17-25-502(3).*" (emphasis added). The language added as subsection (ii) of Ark. Code Ann. § 18-44-115(a)(8)(B) was not included in that statute's direct-sale exception when the *Hammerhead* decision was made, and seems to have been added to assuage the *Hammerhead* minority's concern, as set forth in the dissenting opinion, that the majority's interpretation of the direct sale exception indicated that a "property owner's dealings with a general contractor . . . are always going to fall within the direct-sale exception." *Hammerhead*, 2016 Ark. 162, at *9.

A "residential building contractor" is defined by Ark. Code Ann. § 17-25-502(3) as "any person, firm, partnership, copartnership, association, corporation, or other organization . . . which for a fixed price, commission, fee, or wage, attempts to or submits a bid to construct or contract or undertakes to construct or assumes charge in a supervisory capacity or otherwise manages the construction of a single family residence or the property and structures appurtenant thereto. . . ." It now appears that the direct-sale exception will no longer apply to residential projects.

Because the supplying of the preconstruction notice imposes a substantial burden on materialmen and because commercial owners are considered sophisticated regarding lien claims, commercial projects do not require the preconstruction notice. See Ark. Code Ann. §§ 18-44-115(b)(1), (b)(3). Instead, on commercial projects, Arkansas law requires a so-called "seventy-five-day notice." See Ark. Code Ann. § 18-44-115(b)(5)(A). This notice must be sent to the owner, the owner's authorized agent, or the owner's registered agent and to the contractor before seventy-five days have elapsed from the time that the labor was supplied or the materials furnished. See *id.* The notice must contain a general description of the labor, service, or materials furnished, and the amount due and unpaid; the name and address of the person furnishing the labor, service, or materials; the name of the person who contracted for purchase of the labor, service, or materials; a description of the job site sufficient for identification; and the notice language provided in the statute in boldface type and all capital letters. See Ark. Code Ann. § 18-44-115(b)(6).

The second notice required on residential and commercial projects is the ten-day notice of intent. See Ark. Code Ann. § 18-44-114(a). The lien claimant is required to provide this additional notice to the owner that the lien claimant holds a claim against the building or

improvement, setting out the amount due and from whom it is due, at least ten days before filing a lien. *See id.*

Every person who wishes to avail himself or herself of the provisions of the lien statutes must file a lien account with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated, within 120 days after the last materials were furnished or the work or labor done or performed. Ark. Code Ann. § 18-44-117(a)(1). The lien account must contain (1) a just and true account of the demand due; (2) a correct description of the property to be charged with the lien, verified by affidavit; and (3) an affidavit of notice. *See* Ark. Code Ann. §§ 18-44-117(a)(1), (a)(2). The affidavit of notice must evidence compliance with the applicable notice requirements and contain a copy of each applicable notice given. *See* Ark. Code Ann. § 18-44-117(a)(3).

Actions to enforce the lien must be commenced within fifteen months after filing the lien with the circuit clerk. Ark. Code Ann. § 18-44-119. If no action is taken on the lien by that time, it ceases to exist. *See id.* In suits to foreclose construction liens, the contractor is a necessary party and must be made a party within the period provided in the act for enforcement of such liens. Failure to do so results in dismissal of the lien action. *Johnson v. Southern Elec., Inc.*, 29 Ark. App. 160, 165, 779 S.W.2d 190, 192 (Ark. App. 1989); *see also* Ark. Code Ann. § 18-44-124.

All construction liens have equal priority toward each other without regard to the date of filing of the account or lien or the date when the labor or material was performed or furnished. *See* Ark. Code Ann. § 18-44-110(a)(1). With respect to priority against other encumbrances, construction liens date from the time the construction or repair first commenced, which is “when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate has begun or will soon begin.” Ark. Code Ann. § 18-44-110(a)(2). Examples of commencement specifically set forth in the statute include delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site; grading or excavating the site; laying out lines or grade stakes; and demolition of an existing structure. *See id.* The construction lien does not take priority over a previously recorded construction mortgage. *See Dempsey v. McGowan*, 291 Ark. 147, 151, 722 S.W.2d 848, 850 (Ark. 1987).

To get a construction lien discharged prior to the entry of a final judgment, the owner of the property, any mortgagee or other person having an interest in the property, or any contractor, subcontractor, or other person liable for the payment of the construction lien may file a bond with surety, in the amount of the lien claimed, with the circuit clerk or other officer with whom the lien is filed as required by law. *See* Ark. Code Ann. § 18-44-118. Alternatively, a person desiring to contest a lien may bring an action under section 18-44-118(f), but the issues in the action will be limited to whether the lien was filed in the form required and whether all applicable notice requirements were satisfied. *See* Ark. Code Ann. § 18-44-118(f)(1)-(2). The lien may also be contested by declaratory judgment proceedings. Ark. Code Ann. § 18-44-118(g).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor, or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.